IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE V.GIRI

FRIDAY, THE 7TH SEPTEMBER 2007 / 16TH BHADRA 1929

CRL.A.No. 720 of 2004()

SC.214/2003 of II ADDL. SESSIONS COURT, TRIVANDRUM
CP.8/2002 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II, NEDUMANGAD
CRIME NI.373/2001 OF NEDUMANGAD POLICE STATION.
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APPELLANT:

RAJESH,S/O.RADHAKRISHNAN NAIR,
C.NO.8186,CENTRAL PRISON,
TRIVANDRUM.

BY ADV. SMT.SANGEETHA LAKSHMANA

RESPONDENTS:

STATE OF KERALA,
REP.BY PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI.NOBLE MATHEW

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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J.B. KOSHY & V. GIRI, JJ.

Crl. Appeal No.720 of 2004

Dated this the 7th day of September, 2007

Judgment

Koshy,J.

Appellant was convicted and sentenced to undergo imprisonment imprisonment for life and to pay a fine of Rs.2,000/- for offence punishable under section 302 of the Indian Penal Code. The appellant was the first accused. He was alleged to have killed his mother and sister. Since appellant was financially not able to engage a lawyer, State appointed a lawyer before the trial court and this court under the legal aid scheme. As per the final report, police charged originally accused, his mother Chandrika and father of the accused under section 302, 306 and 323 read with section 34 of the Indian Penal Code. After perusing the records, court charged the appellant alone under section 302 IPC as mother, original A2, died and it was recorded as abated. The allegation of the prosecution was that appellant Rajesh (A1), his mother Chandrika (A2),father of the appellant (A3) and deceased Raji, sister of the appellant

were residing in House No. A.P. X/506 of Anad village. Father used to abuse and assault his wife and children after consuming alcohol. On 2.6.2001, at about 6.30 p.m., father (the third accused) came to the house after consuming alcohol. On that day, at about 8.00 p.m., when the second accused Chandrika asked the third accused as to whether he wanted rice, the third accused answered in the negative. On hearing this, appellant stated that A3 could eat only if he wanted to eat. On hearing this, A3 abused the appellant and at that time, the deceased Raji told the third accused not to consume alcohol any more as the consumption of alcohol by A3 was creating problems. A3 disliked this and questioned the deceased and assaulted the deceased Raji, but, A2 intervened, A3 went to the kitchen and brought a coconut scrapper to assault A2. At that time, A1 intervened and obstructed A3 and there was a scuffle between A1 and A3 and, as a result of which, A1 sustained minor injuries on both his palms. Thereafter, A3 destroyed the household articles and told others to go and die anywhere. Due to the intolerable torture by A3, deceased Raji, along with A1 and A2, decided to commit suicide and, accordingly, they left the house at about 10.00 p.m. on that day and reached the coconut plantation of PW4 at about 10.30 p.m.

Thereafter, A1 and A2 tied a towel around the neck of Raji and pulled the same from both sides. When Raji collapsed, A1 tied the same towel tightly around the neck of A2. Thereafter, A1 dropped MO1 stone on the heads of Raji and dropped the said stone on the head of A2. Both Raji and A2 died due to the combined effect of constriction of neck and the injuries sustained on their head. Here, A1 to A3 were charge-sheeted for offences punishable under section 302, 306 and 323 read with section 34 I.P.C. A2 died in the same incident even before police registered the case. A3 was charge-sheeted only for abetting the suicide, but, the charges of the prosecution was that A2 as well as the deceased Raji were murdered. Therefore, A2 was discharged under section 227 of the Code of Criminal Procedure as there was no evidence of abetment of suicide on the part of A3 by order dated 6.10.2003. Therefore, only appellant faced trial. It is the case of the prosecution that the appellant (A1) and his mother (A2) and deceased together decided to die due to the cruelty of A3 and in that process accused killed the deceased Raji, his sister with the help of his mother (A2) and thereafter A1 killed his mother and, thereafter, he went to another pond and tried to commit suicide by jumping into the pond, but,

since there was no sufficient water he did not die and he went to the police station with the thorthu (bath towel) used for strangulation and gave a confession statement and surrendered himself. Thereafter, he was brought to the place of incident. His father was also arrested. PW9 police constable stated that at 11.35 p.m. on 2.6.2001 Rajesh (appellant) came to the police station and gave Ext.P8 (a) first information statement. On the basis of this first information statement, Ext.P8 F.I.R. was registered. He also stated that the thorthu in the hands of Rajesh was taken into custody and it was marked as MO2. He also identified the shirt and lunki worn by the accused and it was marked as MOs 3 and 4. Explanation of the accused was that police came in the night with a thorthu and took him to the place where the dead bodies were lying. Seeing the dead bodies, he tried to take the dead bodies with his hand. Later, he was taken to the police station and arrest was recorded. When PW9 was examined, he clearly stated that the appellant came to the police station and gave the statement. It is true that confessional part of the statement cannot be accepted in evidence as confessions and incriminating statements given to the police officer are not admitted in evidence. First information statement

is not a substantive evidence and can be treated only to corroborate the informant under section 157 or contradict the maker under section 145 of the Evidence Act. It cannot be used against the maker at trial if he himself became an accused. It cannot be used to corroborate or contradict the statement of other witnesses also as held by the Apex Court in Nisar Ali v. State of UP (AIR 1957 SC 366) and Rakesh Singha v. State of Himachal Pradesh (1996 SCC (Cri) 930). As held by the Supreme Court in Aghnoo Nagesia v. State of Bihar (AIR 1966 SC 119) relying on Dal Singh v. King Emperor (AIR 1917 PC 25) when the accused himself giving the first information statement, the fact of his giving the information is admissible against him as an evidence of his conduct under section 8 of the Evidence Act. If the information is a non-confessional statement, it is admissible against him as an admission under section 21 of the Evidence Act. But, a confessional FIR by the accused to the police cannot be used against him. In Re: Mottai Thevar (AIR 1952 Mad. 586) it was held that there is no bar to rely on a confession made in the first information being used in favour of the accused. In that case, it was also held that when the accused went to the police station with a blood-stained weapon and confessed having killed his

wife, all that is held admissible is that he brought with him a blood stained weapon and informed the death of his wife. In this case, the fact that he went to the police station with a thorthu at about 11.30 p.m. and informed about the death to PW9. During cross-examination of PW9, it is also stated that there were abrasions in the hands of accused.

2. PW2 is a close neighbour. He deposed that he knew the deceased, accused and his father. Father of the accused used to get intoxicated and assault his wife and children. He has very clearly stated that he had seen the accused as well as the deceased Raji and Chandrika at about 10.30 p.m. while he was returning from the river. When he asked where they are going, they did not answer. When he came back to the house, his wife told him that they left the house saying that they are going to die. He also stated that on 3.6.2001 early morning, he saw Radhakrishnan Nair was taken into custody by the police. Apart from PWs 1 and 2, all other witnesses examined are official witnesses like doctors, investigating officers, mahazar witnesses etc. Prosecution relied mainly only on PW2 and scientific evidence to prove the offence alleged against the

deceased by circumstantial evidence. PW10 was the investigating officer. He stated that he had taken impressions from the neck and pal m of Raji using cellophane tapes. The cellophane tapes are marked as MO10 series. He further stated that near the place of incident where the dead body was seen, there was a granite stone which was marked as MO1. He had also recovered the dress and other materials from the dead body. Nail clippings taken from the hand of the accused was taken as MO20.

3. PW7 is the doctor who conducted postmortem examination of the body of Chandrika and issued Ext.P4 postmortem certificate. He noted the following ante-mortem injuries on the body of Chandrika:

> "1. Contusion of back half of left temporalis muscle.
>
> 2. Contusion of scalp 6 x 4 x 0.3 c.m. on the right side of back of head 6 c.m. outer to midline and 3 c.m. below occipit.
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> 3. Lacerated wound '7' shaped on the left side of face with the lower end of its vertical limb (14 x 6 c.m. bone deep) 6 c.m. outer to the ala of nose. The horizontal limb (7 x 4 c.m.) bone deep) extending inwards over the left eye brow from the vertical limb at a point 6 c.m.

above the lower end of the vertical limb (A skin tag seen at the junction of vertical and horizontal limbs). Underneath, the frontal and left parietal bone showed a comminuted depressed fracture over an area of 11 x 7 x 2 c.m. From the back portion of the comminuted fracture a fissured fracture seen extending to right parietal bones and right side of occipital bone. Left side of maxillac was fractured. Both sides of anterior and middle cranial fossa were fractured and fragmented. Thin film of subdural and subarachnoid haemorrhages seen bilaterally. Lacerations were seen on the upper surface of right frontal lobe (5 x 2 x 0.5 c.m.) and on the under surface of left frontal lobe (5 x 2 x 0.3 c.m.). Contusion was seen on the under surface of left temporal lobe (4 x 2.5 x 0.5 c.m.). There were flattening of gyri and narrowing of sulci.

4. Graze abrasion 8 x 7.5 c.m. on the left side of face, extending downwards from the lower extent of injury No.3.

5. Abrasion 6 x 2 c.m. on the left side of neck, horizontal, its inner end 1 c.m. below jaw bone and 5 c.m. outer to midline.

6. Skin contusion 33.3 c.m. long encircling the neck, above and over the thyroid cargilge. It was placed, 6 c.m.

below right ear (2 c.m. broad) 5 c.m. below chin (4 c.m. broad) 7 c.m. below left ear (3 c.m. broad) and 12 c.m. below occipit (1.5 c.m. broad).

Flap dissection of neck was done under bloodless field. Subcutanaeous tissue underneath the above injury showed infiltration of blood over an area 5 x 4 x 1 c.m. on the left side of neck just above the collar bone and 5 c.m. outer to midline. Lower end of left stermohyoid muscle showed infiltration of blood over an area 1 x 1 x 0.5 c.m. Other muscles, vessels, cartilages and bones of neck were normal and intact.

7. Contusion 7 x 5 x 2 c.m. on the left side of front of chest 10 c.m. outer to midline overlying the collar bone.

8. Abrasion 7 x 6 c.m. on the inner aspect of right leg 6 c.m. above heel."

Doctor opined that the death of Chandrika was due to the combined effects of head injury and constriction of neck. He also stated that injury Nos.1 to 3 on the head and injury Nos.5 and 6 on the neck are independently sufficient to cause death in the ordinary course of nature. He further stated that injury Nos.1 to 3 on the head could be caused by a stone like MO1. He again stated that injury Nos.1, 3 and 4 could be caused in a single act and injury Nos.5 and 6 could be caused by MO2 thorthu. PW7 also proved Ext.P5 certificate issued by the Assistant Chemical Examiner, Government of Kerala after analyzing the viscera, blood, vaginal swab and smear of deceased Chandrika which shows that no poison was detected in the blood and other internal organs of deceased Chandrika and no semen and spermatozoa were detected in the vaginal swab and smear of deceased Chandrika.

4. PW8 is the doctor who conducted postmortem examination on the body of deceased Raji and issued Ext.P6 postmortem certificate which shows the following injuries:

> "1. Lacerated wound 7 x 4.5 c.m. bone deep horizontal on the left side of face just in front of tragus of ear.

2. Lacerated wound 3 x 0.8 c.m. bone deep involving the outer half of left eye brow and upper eye lid.

3. Lacerated wound 2 x 1.5 x 1 c.m. on the left cheek.

4. Lacerated wound 1.4 x 0.5 x 1 c.m. on the outer aspect of left side of lower lip 2.5 c.m. below the left angle of mouth.

The above injuries were incorporated in an abrasion 12 x 10.5 c.m. Left side frontal bone, left side of anterior cranial fossa and facial bones of left side were fractured into fragments. Teeth number 24 to 28 were found to be loosened. Mandible was seen fractured at its left angle. Dure underneath the fractured frontal bone was seen torn irregularly, frontal lobe of brain underneath showed a superficial laceration 4.5 x 3.5 x 0.5 c.m.

5. Lacerated wound 0.8 x 0.4 x 0.4 c.m. on the under aspect of middle of chin in the middle surrounded by an abrasion 3 x 2 c.m. Fracture of lower jaw bone between tooth number 31 and 32.

Brain showed subdural and subarachnoid haemorrhages. Sulci were narrowed and gyri were flattened.

6. Abrasion 9 c.m. long horizontal on the front and left side of neck. Its front extent was 5 c.m. below chin (4 c.m. broad) over and below the level of thyroid

cartilage and left back extent was 6.5 c.m. below left ear (6 c.m. broad).

7. Abrasion 3.2 x 1 c.m. oblique on the right side of front of neck, its lower front end was 1.5 c.m. above the inner end of collar bone. Flap dissection of neck was done under bloodless field. Subcutaneous tissue underneath the injury numbers 6 and 7 were normal and intact. Whole thickness of sternomastoid muscle underneath injury number 6 was contused over an area 3.2 x 2 c.m. Whole thickness of sternomastoid underneath injury No.7 was contused over an area 2.5 x 2 .m. Other neck structures including, muscles, bones, cartilages and blood vessels were normal and intact.

8. Abrasion 2.5 x 0.5 c.m. oblique on the left side of front of chest its upper inner end at the inner end of left collar bone.

9. Multiple small abrasions over an area 11.5 x 0.5 c.m. to 0.8 c.m. on the right side of front of chest. Its lower inner extent was 11 c.m. below the root of neck and just outer to midline.

10. Multiple small abrasions over an area 6 x 4.5 c.m. on the back of left arm 5 c.m. above elbow."

PW8 doctor has opined that the death of Raji was due to the blunt injuries sustained on the head and neck. PW8 has further stated that injury Nos.1 to 5 on the head and injury Nos.6 and 7 on the neck are independently sufficient to cause death in the ordinary course of nature. It is further stated by PW8 doctor that injury Nos.1 to 4 could be caused in a single infliction with MO1 stone. He further stated that injury Nos.6 and 7 cou7ld be caused with MO2 thorthu if used as a ligature and injury Nos.8 to 10 could be caused if those parts of the body would come into contact with a rough surface or object. PW8 proved Ext.P7 certificate issued by the Assistant Chemical Examiner, Government of Kerala after conducting the examination of viscera, blood and vaginal swab and smear of deceased Raji which shows that no poison was detected in the blood or other internal organs of deceased Raji and no semen and spermatozoa were detected in the vaginal swab and smear of deceased Raji. Ext.P13 is the certificate issued by the Assistant Director of Biology, Forensic Science Laboratory, Thiruvananthapuram which would show that cellophane tapes in items 6 (b) and 9 (b) and 12 contained fibres similar to those in item No.3. Item No.3 is MO2 thorthu. Item No.9 (b) contained pieces of cellophane tapes pressed on

the neck of deceased Raji and item No.6 (b) contained two pieces of cellophane tapes having impression of the neck of deceased Chandrika. Therefore, it can be seen from Ext.P13 that the neck of Chandrika and Raji contained fibres similar to MO9 thorthu. This certificate would show that both Chandrika and Raji died due to the injuries sustained to the head and neck and it was a case of homicide and not a case of suicide.

5. Ext.P14 FSL report shows that MO3 shirt of the accused and MO1 granite stone contained human blood. Ext.P14 also would show that though MOs 2 and 4, thorthu and lunki respectively, contained human blood, the quantity of blood present was not sufficient to determine the origin. Considering this scientific evidence especially considering the postmortem certificates, FSL reports together, the incident occurred in the night and there was no direct quarrel in the house etc. the accused was found guilty based on circumstantial evidence. Even according to the prosecution, deceased Chandrika and accused together were responsible for the death of Raji. There is no evidence or suggestions by the prosecution witnesses that deceased Raji made any resistance. She was aged over 18. According to the prosecution, all the three left the house for ending their life due to the

cruel behaviour of the father of the accused. Deceased Chandrika, mother of the accused who participated in the killing of her daughter did not go away from the place. She also gave no resistance though she has seen her daughter dying and willingly allowed the accused to get herself killed.

6. One important aspect to be considered is whether appellant is entitled to Fifth exception of section 300 of IPC. Fifth exception reads as follows:

> "Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.
>
> Illustration:
>
> A, by instigation, voluntarily causes, Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder."

It is true that a specific plea claiming the above exception was not put forward by the appellant, but, we note that since the appellant has no means, he was

represented by an advocate appointed by the State under the legal aid scheme. Appeal was filed from the jail. It is true that prosecution has to prove the guilt of the accused conclusively beyond any doubt. The defence of the accused, even if not specifically pleaded, can be gathered from the prosecution evidence itself. The above benefit cannot be denied to the accused on mere technicalities. It is true that as held by the Hon'ble Apex Court, in Vijay @ Chand Jain v. State of MP ((1994) 6 SCC 308), exception 5 to section 300 IPC must receive a very strict and not a liberal interpretation and it needs close scrutiny and consent by necessary implication which cannot be presumed in that case. In that case, accused was frustrated on account of his heavy indebtedness. Therefore, he killed his wife and thereafter attempted to commit suicide. Only implication of consent was that son who saw the mother bleeding did not hear any sound of agony. The Apex Court held that it cannot be presumed that, because of the above, deceased consented others to cause the murderous assault. The Hon'ble Apex Court has confirmed the Full Bench decision of the Calcutta High Court in Queen Empress v. Nayamuddin (ILR (1891) 18 Cal. 484) while holding that liberal interpretation should not be given to Exception 5 to section 300 of IPC.

In Dasrath Paswan v. State of Bihar (AIR 1958 Patna 190), the accused was a student of Class X. He had failed in the annual examination for three years in succession. His wife aged 19 was a literate woman. The accused was very much upset and took his last failure too much to the heart that he decided to end his life and informed the decision to his wife. His wife asked him to first kill her and then kill himself. In accordance with the pact, accused first killed his wife and he was arrested before he could kill himself. The court held that deceased did not give consent under fear of injury or under a misconception of fact and, therefore, the accused is entitled to the benefit of Exception 5 of section 300 of IPC. In that case, sentence imposed was five years' imprisonment under section 304 Part I of IPC.

7. We also refer to the decision in Ujagar Singh v. Emperor (AIR 1918 Lahore 145) on the same point. Two decisions of the Madras High Court were also cited and different views were expressed in the above on the facts of those cases. The whole question is whether the deceased who gave consent was aged more than 18 and whether consent was given under a misconception. In Re: Ambalathil Assainar(AIR 1956 Mad.97), out of poverty,

husband directed his wife to go back to the house of her mother. She refused and stated that it is better to kill her than going to the house of the mother. Husband then inflicted an injury by knife. Since consent was not unequivocal, but, conditional otherwise, she will have to deprive the company of the husband. The husband more or less was responsible for making her conditional consent. On these facts, Madras High Court held that Exception 5 cannot be denied. Here, in this case, accused, at the time of commission of offence, was aged only 19. The deceased was his elder sister and his mother. The prosecution case itself is that due to the unconscionable conduct of the father of the accused, his sister and mother together left the house to the place of incident for ending their lives. According to the final report filed by the police, both accused and the mother (original second accused), as per the suicide pact, strangulated the sister and thereafter head injury was also inflicted. Mother, who was a party to the same even after seeing this, did not make any trial for escape and son has authorised strangulating her and killing her and head injury was inflicted. The accused also jumped in the nearby pond, but, there was no sufficient water and

he went with the bath towel used for strangulating the sister and mother to the police station and surrendered himself with the bath towel. Consent granted by the mother and sister were unequivocal and unconditional. The fact that mother did not move or offer any resistance and who helped the accused for murdering his sister also shows that there is substance in the claim that the murder was executed on the basis of the suicide pact. In England, before introduction of Homicide Act, what was the common law position was mentioned in the **Halsbury's Laws of England** (Vol. 11 (1), Fourth edition, Reissue) wherein it is stated as follows:

> "23. **Consent:** In relation to offences against the person or against property it is the general rule that acts are criminal only when they are done without the consent of the person affected or the owner of the property concerned. If a person agrees to physical contact or consents to an appropriation of property or is willing that his property be destroyed or damaged, there is no offence of assault, theft or criminal damage. Consent is a defence only to the extent that the act constituting the alleged offence falls within that which is freely

> permitted by the other. Consent obtained by threats is no consent. Whether consent is nullified by fraud depends upon whether the fraud goes to some matter fundamental to the consent or to something which is merely collateral to it. Consent is not negatived merely because the victim would not have agreed to the act had he known all the facts; nor is consent negatived where the victim is deceived in some collateral matter. Consent is negatived where the victim is deceived as to the nature of the act; and as to the identity of the doer."

Consent is not considered as a defence to murder or legal prize fight or certain statutory offences involving children or young persons who cannot concern. Exemptions were created by the Homicide Act, 1957 as amended by Suicide Act, 1961. Section 4 of the Homicide Act reads as follows:

> "4. **Suicide pacts:** (1) It shall be manslaughter, and shall not be murder, for a person acting in pursuance of a suicide pact between him and another to kill the other or be a party to the other ..... being killed by a third person.
>
> (2) Where it is shown that a person charged with the murder of another killed the other or was a party to his .... being killed, it shall be for the defence to prove

> that the person charged was acting in pursuance of a suicide pact between him and the other.
>
> (3) For the purposes of this section 'suicide pact' means a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life, but, nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact."

Under the above section, a person acting in pursuance of a suicide pact between himself and another, kills the other or is a party to the other being killed by a third party, he is guilty of manslaughter. For these purposes, 'suicide pact' means a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life, but, nothing done by a person who enters into a suicide pact is to be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact. It is true that burden is on the party to prove the above defence. Here, the prosecution evidence and the police charge itself would

prove that the murder was committed by the accused on the basis of the suicide pact even though his bid to kill himself did not succeed. In the above circumstances, we are of the opinion that he is entitled to the benefit of Exception 5 of section 300 of the Indian Penal Code and he can only be found guilty for culpable homicide and manslaughter not amounting to murder. It was argued by the learned counsel for the appellant that he was aged only 19 at the time of incident. Father was not maintaining the family. He was a coolie. They were totally frustrated that father was not allowing them to live a peaceful life though by the meagre income received by the accused doing coolie work, he was maintaining the family. Hence, conviction and sentence under section 302 of I.P.C. are liable to be set aside. But, we are of the opinion that even though under the suicide pact, with their consent, he killed his own mother and sister, in view of the nature of crime, a very lenient view cannot be taken. We convict and sentence him to undergo imprisonment for ten years and to pay a fine of Rs.2,000/- under section 304 Part I of the Indian Penal Code and in default of payment of fine he

shall undergo imprisonment for another three months. Appellant is also entitled to right of set off.

With the above observation, the appeal is allowed partly.

J.B.KOSHY
JUDGE

V. GIRI
JUDGE

vaa

J.B. KOSHY AND
V.GIRI,JJ.

Crl. Appeal No.720/2004

Judgment

Dated:7th September, 2007